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No. 90-1676

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

MARY GADE, Director of the Illinois Environmental Protection Agency,

Petitioner,

VS.

NATIONAL SOLID WASTES MANAGEMENT ASSOCIATION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED[1]

1) When petitioner fails to submit a plan pursuant to Section 18(b) of Occupational Safety & Health Act, can such a non-complying State enact a statute compelling certified proof of 4,000 hours of heavy equipment operation as a condition of State licensure and thereby avoid the clear preemptive intent and effect of the Act and OSHA's regulations to the contrary?

2) Can a petitioner without any 18(b) plan, avoid that clear expression of Congressional intent when that State failed to demonstrate at trial that its 4,000-hour requirement would serve the articulated State purpose purporting to protect the health and safety of the public?

3) Should this Court intervene in this litigation by acceptance of the case at this preliminary stage of the litigation?

[1] National Solid Wastes Management Association (NSWMA) believes the question presented by the State of Illinois does not sufficiently comprehend the nature of the case and, therefore, proposes its own.

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JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated and discussed more fully by the argument below, respondent does not believe petitioner has shown any reason for this Court to exercise its sound judicial discretion to grant the petition.

STATEMENT OF THE CASE

I. What Still Remains For Adjudication On Remand

The most important factors in this case are omitted by Petitioner's statement of the case. Although Illinois has no general licensing scheme for operators of heavy equipment or laborers, in the area of hazardous waste and emergency response, Illinois enacted such a licensing scheme with a variety of conditions for licensure and a variety of exemptions. (The two statutes at issue—the "Illinois Hazardous Waste Crane and Hoisting Equipment Operators Licensing Act" and the "Illinois Hazardous Waste Laborers Licensing Act"—are produced in full at Petitioner's Appendix 73-98.) Plaintiff National Solid Wastes Management Association (NSWMA) brought an action challenging these two statutes on both Supremacy Clause and Commerce Clause bases.

After an evidentiary hearing and multiple briefs, the trial court rendered lengthy findings of fact. The only relief granted was the striking from the statutes of the "within Illinois" language that required training to occur intra-state as a condition of licensure. (That decision was not appealed by the State and is not involved in any further appeal.) The trial court found NSWMA's Commerce Clause attack was not ripe and, therefore, did not address that issue. The trial court found against NSWMA only on the 4,000-hour requirement as not preempted. (Again, the 4,000-hour requirement was also the subject of a Commerce Clause attack, left unaddressed by the trial court.)

On appeal, the Seventh Circuit reversed the only adverse finding against NSWMA (the 4,000-hour requirement), technically "affirmed" the trial court because the

"within Illinois" requirement was not appealed, and remanded the entirety of the remainder of the case to the trial court.

Upon remand, the trial court is to reconsider, or consider for the first time, the bulk of NSWMA's challenges to the two statutes. Those challenges, yet to be ruled upon by any court, include the following:

a. NSWMA's preemption attack on the remainder of the statutes;

b. NSWMA's Commerce Clause challenge to the statutes based upon the exemption of certain classes of employees. ". . . we note that such exemptions may suggest an intent by a state to discriminate against interstate commerce in favor of local interests . . ." citing *Raymond Motor Transport, Inc. v. Rice*, 434 U.S. 429 (1987) *supra* (at 918 F.2d 684-685);

The Seventh Circuit went on to say:

> "On remand, therefore—assuming that some portions of the Illinois statutes survive pre-emption analysis—the district court should inquire into the purpose and likely effect of these exemptions and determine whether they unduly burden interstate commerce." (918 F.2d at 684);

c. The State law severability question (fn. 18, 918 F.2d at 684);

d. NSWMA's Commerce Clause challenge to the entirety of the statutes on the basis that *per se* intent to discriminate, as shown by the "within Illinois" requirement, was not cured by striking same;

e. NSWMA's challenge to testing and other requirements given that they must occur "within Illinois"; thus Illinois is regulating interstate commerce in a discriminatory intra-state manner by the "back door."

f. The alternative Commerce Clause challenge to the 4,000-hour requirement;

Despite NSWMA's attempts to litigate and gain adjudication of these issues at both trial and appellate levels, these issues have yet to be decided by either the court of first or second instance. The full challenge to these constitutionally obnoxious statutes has yet to be perfected nor has full adjudication been permitted.

II. The Findings of Fact

The trial court's Findings of Fact below remain undisturbed. Those findings form the factual context of this litigation. Those findings show:

* * * * *

3. National's members operate under and are subject to the Occupational Safety and Health Act (OSH Act), the Occupational Safety and Health Administration (OSHA), as well as other federal statutes such as the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) and the Superfund Amendments and Reauthorization Act of 1986 (SARA), 42 U.S.C. sec. 9601 *et seq.*

* * * * *

9. These employees are field-experienced, trained and qualified to engage in hazardous waste remediation work in accordance with interim OSHA Regulation, 29 C.F.R. Part 1910.120.

10. National's members perform hazardous waste remediation work on a national basis, and their employees commonly work in more than one state over a given period of time.

11. National's members are required by OSHA regulation to train, qualify, and certify their hazardous waste remediation workers. See 29 C.F.R. Part 1910.120.

12. Part 1910.120 regulates training, medical surveillance, job site analysis, field experience, specific decontamination procedures, drum handling, annual refresher courses, as well as other specific procedures and competency standards for hazardous waste remediation workers, including equipment operators and laborers.

13. OSHA periodically has audited and approved the OSHA mandated training program of some of National's members to ensure they are complying with the regulation.

* * * * *

15. The IEPA did not participate in the drafting or passage of either of the Illinois Act, but Local 150 of the Operating Engineers' union did.

16. The Illinois Acts regulate the same matter (and therefore the same employees) as Part 1910.120.

* * * * *

19. Killian introduced no evidence at trial which would arguably tend to show that the training-within-Illinois or 4,000-hour requirement would reduce the risk of danger to the public or employees or the environment. Indeed, one of National's experts, Dr. Fred Halvorsen, testified that if implemented and enforced, there is "some possibility" the Illinois Act would increase such risk.

20. One of the ways in which the Illinois Acts could result in increased risk is that they would diminish the pool of workers available to clean up hazardous waste sites; and this diminution could be critical in an emergency response situation.

21. Thus, under the Illinois Acts an employer could not send into Illinois to perform hazardous waste "remediation" services any employees who had not received 40 hours of training within Illinois or (to perform heavy equipment operations) any employee who could not present certification that he had at least

4,000 hours of experience operating equipment used in hazardous waste handling.

22. And this could frustrate an employer's attempt to respond to environmental emergencies. For example, some of National's members have contracted with the United States EPA to perform emergency response work (aptly called Emergency Response Contracts); and meeting these obligations could be impaired by the Illinois Acts.

23. In addition, the Illinois Acts carry the potential to disrupt the operation of the federally-endorsed "Buddy System."

24. Part 1910.120(a)(3) defines the "Buddy System" as "a system of organizing employees into work groups in such a manner that each employee of the work group is designated to be observed by at least one other employee in the work group." By making employees responsible for one another, the Buddy System fosters "rapid assistance to employees in the event of an emergency."

25. The Illinois Acts, however, may well throw a monkey wrench into the Buddy System because they carry the potential of impairing employers from developing effective work groups. Suppose an employer put together a work group of ten employees who were based in Indiana, but only four of whom were qualified to be licensed under the Illinois Act; it is conceivable (though by no means certain) that in responding to an emergency in Illinois, the Buddy System for those four licensed employees would be kaput.

(Findings of Fact, Petitioner's App. 47-51)

Thus, all findings of fact necessary to show the true *conflict* between the Illinois statutes and OSH Act were, in fact, found by the trial court. The trial court found an identity of subject matter regulation (FOF #16). These findings of fact require deference from this Court.

INTRODUCTION TO ARGUMENT

Illinois' petition for writ of certiorari is premature at best. Petitioner's argument avoids the central fact, fatal to its petition, that the Seventh Circuit decision voided merely one term of a lengthy statute and that the bulk of NSWMA's attack on the State statutes at issue has been remanded for further preemption and Commerce Clause analyses.

Thus, constitutional analysis of the Illinois statutes remains at an early stage and resolution of all the issues—both constitutional, including Supremacy and Commerce Clause challenges as well as state law questions—are far from final. At this stage, under any set of circumstances, this Court's decision would itself require remand. Prudence dictates that this Court should refrain from intervention and review until *all* of the important constitutional and state law issues are ruled upon by the lower courts. A waste of judicial resources would result if review occurred in a piecemeal fashion. One could not do better than to quote the opinion below on the *ad hoc* approach inherent in this area of preemption:

> . . . courts have been obliged to address alleged conflicts between national and local legislation on a statute-by-statute (or regulation-by-regulation) basis. (Petitioner's App. 5)

National Solid Waste Management Ass'n v. Killian, 918 F.2d 671, 673 (7th Cir. 1990).

While the circuit courts considering these various statutes and regulations have somewhat differed in the details of an appropriate test, it will be demonstrated unequivocally that all the circuit courts have found Section 18

of the Occupational Safety & Health Act (OSH Act) to have express preemptive effect. Further, it will be established that the result in the instant case would not change under any particular test.

Even at this stage of litigation when all factors are weighed, ultimately it is Illinois' failure to submit a plan under Section 18(b) of the OSH Act that prevents Illinois from intruding in this specific and limited regulatory area. Section 18 of the OSH Act is the balanced structure for federalism: if the State is willing to submit a plan, upon approval, the State retains its ability to regulate even where Federal regulations may differ. Upon a State's refusal to take that procedural step, the courts are compelled to rule, as the Seventh Circuit has done—albeit at a preliminary stage and in a less-than final decision.

It is respondent's view that the State's petition is premature and seeks incomplete relief. At this preliminary stage, it would be a waste of judicial resources to review the striking of one requirement.

ARGUMENT

I.

THE SEVENTH CIRCUIT DECISION THAT SECTION 18 OF THE OCCUPATIONAL SAFETY & HEALTH ACT EXPRESSLY PREEMPTS A SINGLE STATE REGULATION DOES NOT CONFLICT WITH THIS COURT'S OPINIONS.

Six separate circuit courts of appeal have rendered decisions holding that Section 18 of the Occupational Safety & Health Act (OSH Act) expressly preempts state regulation of occupational safety and health standards relating to any occupational safety and health issue in which a Federal standard has been promulgated.[2] Thus, petitioner must implicitly argue that each of the decisions of these six circuits is in conflict with this Court's opinions.[3]

Read together, Section 18(a) and 18(b) of the OSH Act, 29 U.S.C. §667(a), (b) state:

> Nothing in this chapter shall prevent any State Agency or court from asserting jurisdiction under State law over any occupational safety or health issue with respect to which no standard is in effect under Section 655 of this title.

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[2] *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274 (1st Cir. 1990); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir. 1988); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985) (*Hughey I*), *appeal after remand*, 868 F.2d 621 (3d Cir.) (*Hughey II*), *cert. denied*, 109 S.Ct. 3246 (1989); *National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671 (7th Cir. 1990); *Farmworker Justice Fund, Inc. v. Brock*, 811 F.2d 613, 625-26 (D.C. Cir. 1987), *opinion vacated on other grounds*, 817 F.2d 89 (D.C. Cir. 1987); and *Ohio Mfrs. Ass'n v. City of Akron*, 801 F.2d 824, 828 (6th Cir. 1986).

[3] Petitioner principally cites *English v. General Electric Co.*, ___ U.S. ___, 110 S.Ct. 2270 (1990).

> Any state which, at any time, desires to assume responsibility for development and enhancement therein of occupational safety and health standards relating to any occupational safety or health issue with respect to which a Federal standard has been promulgated under section 655 of this title shall submit a State plan for the development of such standards and their enforcement.

The language is plain and direct. The first paragraph recognizes that the States play the traditional role in regulating occupational safety and health issues. Thus, if the federal government does not act, the historical bundle of powers remains with the several States. Again, in clear and direct language, the second paragraph provides that if the federal government promulgates a standard on an issue of occupational safety and health and a State attempts to assume responsibility for such an issue, then the State *shall* submit a plan for review and approval. Unless and until such a plan is approved, the responsibility, the sole authority for such regulation resides with the federal government.

Petitioner does not argue that the federal agency lacked authority to promulgate the regulations at issue, 29 CFR §1910.120. Nor is it an issue that the State statute regulates different subjects from the federal regulation. Indeed, the appropriate deference must be given to the trial court's finding of fact that: "The Illinois Acts regulate the same matter (and therefore the same employees) as Part 1910.120." (Finding of Fact #16; see Petitioner's App. 49; p. 5, *supra*)

Petitioner conveniently ignores the fact that the decision in *National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671, 679-80 (7th Cir. 1990) (*NSWMA*) expressly relies upon the very Supreme Court opinion petitioner

now claims has been violated. The Seventh Circuit opinion states:

> Our test for OSHA preemption of a state law or regulation corresponds closely to the test recently announced by the Supreme Court for application to state laws allegedly impacting upon the federally-reserved field of nuclear health and safety. *English v. General Electric Co.*, ___ U.S. ___, 110 S.Ct. 2270, 110 L.Ed.2d 65 (1990).

In fact, the Seventh Circuit opinion proceeds to analyze and to adopt the holding in an additional Supreme Court opinion which petitioner now claims has been violated. The Seventh Circuit opinion states that step one of its test corresponds to the holding in *Pacific Gas & Elec. Co. v. State Energy Resources Conservation and Dev. Comm'n*, 461 U.S. 190, 103 S.Ct. 1713, 75 L.Ed.2d 752 (1983). See *NSWMA*, 918 F.2d at 679.

Petitioner attempts to unreasonably narrow the field of express preemption. Petitioner would limit a finding of express preemption solely to statutes or regulations that contain directory language to *explicitly preempt*. (See Gade's Petition, page 9, fn. 3.) Yet, it is clear that express preemption also includes those areas where the statute or regulations contain *explicit preemptive language*, i.e. language that is interpreted to mean a clear and manifest Congressional intention to preempt. Express preemption occurs under both sets of terminology. Petitioner's narrow view of the contours of express preemption directly conflicts with the authoritative view found in such decisions of this Court as *Jones v. Rath Packing Co.*, 430 U.S. 519, 97 S.Ct. 1305, 51 L.Ed.2d 604 (1977) and *Capital*

Cities Cable, Inc. v. Crisp, 467 U.S. 691, 104 S.Ct. 2694, 81 L.Ed.2d 580 (1984).[4]

Section 18 contains explicit preemptive language. Plainly interpreted, Section 18 "unquestionably preempts any state law or regulation whose sole purpose and effect is to establish a standard pertaining to workers health and safety where OSHA has already promulgated such a standard and the state has not obtained the Secretary of Labor's approval for its own plan." *NSWMA*, 918 F.2d at 677.

Additionally, OSHA has explicitly stated the preemptive effect of the federal regulation. See 29 C.F.R. §1901.2 (1989). OSHA states in the "federalism" discussion in the preamble accompanying the rule:

> . . . Under the OSH Act, a state can avoid preemption only if it submits, and obtains, Federal OSHA approval of a plan . . . .
>
> * * * * *
>
> Those states which have elected to participate under Section 18 of the OSH Act would not be preempted by this broad regulation and would be able to address special, local conditions within the framework provided by this performance oriented standard while ensuring that their standards are at least effective as the Federal standards.

54 Fed.Reg. at 9315-16.

[4] One would not necessarily expect that the OSH Act would explicitly preempt State laws in the area of occupational safety and health issues precisely because the regulation of such issues are traditionally under the States' Police Power. However, the OSH Act contains explicit preemptive language because it is Congress' clear intent that federal standards promulgated on such issues shall supersede State attempts unless and until the State submits plans which are approved.

The judicial branch gives deference to a federal agency's interpretation of the intent and scope of its standards. This Court has ruled that such an interpretation should not be disturbed unless the judiciary is convinced that such regulations would not have been authorized by Congress. *City of New York v. FCC*, ___ U.S. ___, 108 S.Ct. 1637, 1642 (1988). See also, *Mississippi Power & Light v. Miss. ex rel. Moore*, ___ U.S. ___, 108 S.Ct. 2428, 2443 (1988) (Justice Scalia concurring in judgment).

As stated earlier, each and every Federal circuit court which analyzed and interpreted Section 18 has found that it contains explicit preemptive language. Thus, the First Circuit in *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274, 278 (1990) held:

> . . . this section [Section 18 of the OSH Act] *clearly* provides that if a federal standard on an occupational safety or health issue is in effect, a state cannot promulgate an occupational safety or health standard relating to that issue, unless it first submits the plan to OSHA for approval. (citation omitted) (emphasis added)

The Second Circuit Court of Appeals in *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 55 (1988) held:

> . . . Under §18(b), if a federal standards covers an occupational safety or health issue the states or their political subdivisions cannot promulgate an occupational safety or health standard relating to the issue, absent submission of the program to OSHA. 29 U.S.C. §667(b).

The Third Circuit Court of Appeals in *Hughey I* at 774 F.2d 592 ruled:

> As we held in *Steelworkers* [*United Steelworkers of America v. Auchter*, 763 F.2d 728 (1985)], Section

> 18 of the OSH Act expressly preempts state law pertaining to issues that are addressed by OSHA standards unless a state plan has been approved by the Secretary.

Again, in *Hughey II* at 868 F.2d 625-26 the Third Circuit reiterated its holding and stated:

> Section 18(b) of the OSH Act, 29 U.S.C. §667(b), expressly preempts state occupational safety and health standards relating to any occupational safety or health issue with respect to which a [f]ederal standard has been promulgated under 29 U.S.C. §655.

The District of Columbia Circuit in *Farmworkers Justice Fund, Inc. v. Brock*, 811 F.2d 613, 625-26 (1987) stated:

> The legislative history of the OSH Act is replete with evidence that Congress explicitly considered the issue of federal-state relations and determined that the federal government, within the limits of its resources, must assume responsibility for initiating standards in the occupational health field.

Finally, in *Ohio Mfrs. Ass'n. v. City of Akron*, 801 F.2d 824, 828 (1986) the Sixth Circuit Court of Appeals stated:

> The [OSH] Act does provide that once the Secretary of Labor has promulgated a standard, states are expressly preempted from regulating on that held pursuant to Section 18. . . .

With the addition of the Seventh Circuit opinion in *NSWMA*, the unanimous view of six circuits is that Section 18 of the OSH Act contains explicit preemptive language because Section 18 manifests Congress' clear intention to regulate if States do not submit plans for OSHA approval. Each of the six circuits have made this finding after thorough and cogent analysis of all Supreme Court precedents. Petitioner's conclusion that the *NSWMA* decision violates Supreme Court precedent is erroneous. In fact, the *NSWMA* decision explicitly follows Supreme Court precedent.[5]

II.

NO SUBSTANTIVE CONFLICT AMONG THE CIRCUITS EXISTS.

The principal holding in the Seventh Circuit opinion in *NSWMA* is that Section 18 of the OSH Act provides for express preemption. This principal holding is in conformity with each and every circuit court of appeals that has analyzed Section 18 under the Supremacy Clause.

Additionally, no substantive conflict exists because the other circuits addressed different matters, such as different state regulatory schemes and different federal regulations. The Seventh Circuit in its *NSWMA* opinion expressly states that the issues before it were not the same matter as the issues presented to other circuits. The *NSWMA* opinion states:

> . . . In neither *Hughey* nor *Knepper* did the Third Circuit confront a true 'dual purpose' problem. . . . 918 F.2d at 682-83.

Similarly, the only area where the *NSWMA* decision diverges from the analysis of *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir. 1988) is that *Encapsulating* "relies too heavily on an assessment of the legislature's subjective purpose." *NSWMA*, 918 F.2d at 684.

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[5] Even the author of the *dubitante* opinion below, Judge Easterbrook, voted *against* rehearing the State's petition. Petitioner's App. 1 & 2.

Furthermore, the *NSWMA* decision actually supplements rather than conflicts with the First Circuit's decision in *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274 (1990). The *NSWMA* decision goes one step further beyond the *Snow* analysis because the Seventh Circuit correctly recognizes the constitutional tension that must arise when a "dual purpose" State provision stands in opposition to existing federal standards on the same issue. The opinion in *NSWMA* correctly holds that if the effect of the worker health and safety aspect of the State statute cannot be extricated, it must be preempted. This analysis employs classic Supremacy Clause analysis. Clause 2 of Article VI to the Federal Constitution states, in part:

> . . . the Laws of the United States which shall be made in Pursuance Thereof; . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

As the *NSWMA* opinion noted: Any other approach would nullify Congress' clear intent to require States to submit Section 18(b) plans for approval. 918 F.2d at 678-79.

It must be noted that the only State provision ruled upon by the Seventh Circuit was the 4,000-hour requirement for heavy equipment operators. It is simply inaccurate for petitioner to argue that the one and only Seventh Circuit finding that the State provision of 4000 hours was expressly preempted by Section 18 of the OSH Act is in substantive conflict with any of the other circuits. None of the other circuits addressing the preemptive impact of Section 18 had before it a similar State provision or State requirement. Indeed, all of these circuits have uniformly held that Section 18 provides for express preemption.

III.

BECAUSE THE RESULT WOULD NOT CHANGE, THE EXISTENCE OF ANY SUBSTANTIVE INTER-CIRCUIT CONFLICT IS IRRELEVANT TO THIS PETITIONER.

If this Court were to find that there exists a substantive inter-circuit conflict, under any analysis or test the 4000-hour requirement would be found to be expressly preempted. Hence, under any analysis the result would not differ and granting the petition would be irrelevant to the petitioner.

Proper deference must be given to the trial court's finding of fact that petitioner "introduced no evidence at trial which would arguably tend to show that the training within Illinois or 4,000-hour requirement would reduce the risk of danger to the public or employees or the environment." (Finding of Fact #19; see Petitioner's App. 49-50; p. 5 *supra*) Thus, the trial court found that the petitioner failed to demonstrate that its provisions served either of the dual purposes to promote job safety and to protect life, limb and property.

Four circuit courts of appeal, including the Seventh Circuit Court of Appeal in *NSWMA*, have articulated tests for finding express preemption under Section 18 of the OSH Act.[6] Under each test Illinois' 4,000-hour requirement would fall. The 4,000-hour requirement would fall under the Third Circuit's analysis because the primary

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[6] *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274 (1st Cir. 1990); *Environmental Encapsulating Corp. v. City of New York*, 855 F.2d 48 (2d Cir. 1988); *New Jersey State Chamber of Commerce v. Hughey*, 774 F.2d 587 (3d Cir. 1985) (*Hughey I*), *appeal after remand*, 868 F.2d 621 (3d Cir.) (*Hughey II*), *cert. denied*, 109 S. Ct. 3246 (1989); *National Solid Wastes Management Ass'n v. Killian*, 918 F.2d 671 (7th Cir. 1990).

purpose of the Illinois scheme is to promote job safety. Because Illinois has failed to submit a Section 18 plan, express preemption occurs. See *N.J. State Chamber of Commerce v. Hughey*, 774 F.2d 587, 595 (3d Cir. 1985).

The 4,000-hour requirement would fall under the Second Circuit analysis because petitioner has failed to demonstrate that this requirement serves the purpose of protecting the general health and safety. See *Environmental Encapsulating Corp. v. New York City*, 855 F.2d 48, 57 (2d Cir. 1988)

The 4,000-hour requirement would fall under the First Circuit analysis because the petitioner has failed to demonstrate that the effect of the 4,000-hour requirement is to protect the public. See *Associated Industries of Massachusetts v. Snow*, 898 F.2d 274, 280 (1st Cir. 1990).

In summary, an alternative ground for denying the petition for writ of certiorari is the irrelevance of the result to this petitioner. Under the current law, all the circuits would find that Section 18 is an express preemption statute and further each and every circuit would find that Illinois' 4,000-hour requirement is expressly preempted.

CONCLUSION

For the above reasons—that intervention by this Court at this stage of the litigation is premature and a dissipation of valuable judicial resource, that no conflict exists between the Seventh Circuit's opinion, and those of this Court or any other circuit, and that the result would not change—respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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